NO. 44558-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

CHRISTOPHER EUGENE SETZER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.07-1-00433-5

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Contents

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

A. RESPONSE TO ASSIGNMENT OF ERROR

I. SETZER RECEIVED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

B. STATEMENT OF THE CASE

Christopher Eugene Setzer (hereafter 'Setzer') was charged by Information with one count of felony Telephone Harassment-Death Threat. CP 1. Setzer was found guilty as charged after a jury trial. CP 2. He received a standard range sentence. CP 6. Setzer appealed his conviction, which was affirmed by this Court in *State v. Setzer,* 152 Wn. App. 1004 (2009). Review was denied by the Supreme Court. *State v. Setzer*, 170 Wn.2d 1006 (2010). Setzer then filed a personal restraint petition under Court of Appeals case number 42816-4. The Court of Appeals transferred the personal restraint petition to the Superior Court of Clark County for a decision on the merits pursuant to RAP 16.12. CP 24-25. The Superior Court heard testimony on this matter on December 6, 2012, and issued its written Memorandum Opinion and Order, denying relief and dismissing Setzer's personal restraint petition. CP 360-68. Setzer now appeals the trial court's dismissal of his personal restraint petition. CP 372.

The evidence at trial showed that Setzer was a customer at Richie's Tire Factory. During his appointment he had a disagreement with Duane

McCollum, Service Manager, regarding whether damage was done to the interior of Setzer's dashboard during his service. Setzer was angry and discussed the issue with the owner of Richie's Tire Factor, yelling that McCollum had "messed up his truck." Setzer was ordered out of the shop. Setzer then parked his truck in an adjoining parking lot for two hours and stayed there. The next day, Setzer called and asked for McCollum. Setzer "immediately blew off the handle," telling McCollum he was going to sue; Setzer yelled and used profanity throughout the call and he told McCollum that he was "gonna come back and take care of [McCollum]...even if he had to kill [him.]" Police were called and responded to Richie's Tire factor; the officer noted McCollum was "clearly frazzled by what was said to him" and indicated he feared for his life. Setzer denied making any threats. *State v. Setzer*, 152 Wn. App. 1004 (2009); CP 369-70.

In voir dire, a juror identified as Dana Miles indicated she knew a Dean Gregory from Carson. CP 366. She stated she may have gone to school with him. The judge asked, "So if you know him, how would that affect you if he testifies as a witness?" CP 366. Ms. Miles responded, "Negative. It would be negative." CP 366. The court further asked, "So you've already formed an opinion then?" And the juror responded, "Based on my prior knowledge, correct." CP 366. The juror was then challenged for cause by defense counsel and the court excused her. CP 366.

At the fact-finding hearing in Setzer's personal restraint petition, his trial counsel, Steve Thayer testified. 12/06/12 RP at 60-93, 96-104. Thayer testified regarding the issue of jury selection and his choice not to challenge the entire jury panel. He indicated that his main concern in picking a jury was "to make sure that we don't have anybody sitting on the panel that's going to be unfair to my client. That's my main concern." 12/06/12 RP at 69. He further testified regarding jury selection,

> Anybody that's done it knows that it's more of a de-selection process than a selection process and what you're trying to do is de-select jurors who indicate in some way they may not be fair. You have a limited ability to do that. You can challenge for cause. If you challenge for cause, it's advisable tactically to make sure the challenge is successful so that you don't give the impression to the jury that you're being unreasonable. At the same time, you don't want anybody sitting on the jury that—that can be successfully challenged for cause. And then the other secondary priority is to make intelligent exercise of your preemptory challenges.

12/06/12 RP at 69-70. Thayer stated that his ultimate concern is whether the jury panel is going to be biased. 12/06/12 RP at 70-71. Regarding a juror who knows a witness, defense counsel believes this does not automatically mean that juror will be biased and on that information alone, a challenge for cause could be unsuccessful. 12/06/12 RP at 71. Defense counsel testified that he wants a high probability of succeeding if he mounts a challenge for cause in front of the jury panel. 12/06 RP at 71.

Regarding juror Ms. Miles, counsel did not believe that she had tainted the entire panel based on trial counsel's feeling for the jury venire, and the juror's comments that her opinion of a witness would be "negative,". Counsel described her statements as "a very brief exchange." 12/06/12 RP at 76. Defense counsel did not believe he would have been successful if he had moved to strike the entire jury panel and he believed it would have been "tactically inadvisable." 12/06/12 RP at 77. Counsel testified further regarding the possibility of moving to strike the entire jury panel,

> It would have been a bloodbath and it just would have been damaging, I think, to my image and my image is important for my client's interests. You know, I—if we chal—if we make a challenge to a juror, we need to make sure that we're going to be successful. If we challenge the entire panel and we fail, I think that that would be detrimental, you know, because it would be, basically, we're impugning the integrity and impartiality of the entire panel to assume that they would be unfair or—unfair to my client just because one witness who said she had a negative impression of a witness had been excused for cause.

12/06/12 RP at 77. Further, counsel believed, "...that we got her out of there in time to prevent any real damage from being done." 12/06/12 RP at 78.

In its Memorandum of Opinion and Order on Setzer's personal restraint petition, the Superior Court found that Ms. Miles' statements in

the presence of the other jurors were very limited and that there was an insufficient basis to challenge the entire panel. CP 366. The Superior Court further found that it would have been highly unlikely the trial court would have granted a challenge to the entire jury panel. CP 366. The Superior Court found trial counsel was "experienced and capable" and that he "provided able and reasoned representation" to Setzer during trial. CP 368. The Superior Court found no evidence of deficient representation and no showing of prejudice. CP 368. The Superior Court denied relief. CP 368.

C. ARGUMENT

Setzer challenges the dismissal of his personal restraint petition in this direct appeal of the Superior Court's decision after the Court of Appeals transferred his personal restraint petition for a decision on the merits. He argues the facts presented at the hearing on his personal restraint petition proved his trial counsel was ineffective for failing to move to disqualify the entire jury venire after a potential juror expressed she knew one of the witnesses and had a negative opinion of him. However, Setzer's attorney's decision not to challenge the entire jury panel was a tactical decision he made based on his significant experience and know-how. Further, Setzer cannot show he was prejudiced by his

attorney's failure to move to disqualify the jury panel as it is unlikely the trial court would have granted such a motion. Setzer's claim for ineffective assistance of counsel fails.

"A decision of a superior court in a personal restraint proceeding transferred to that court for a determination on the merits is subject to review in the same manner and under the same procedure as any other trial court decision." RAP 16.14(b). This Court limits its review of a trial court's findings of fact to those to which error has been assigned. *State v. Hill,* 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Setzer has not assigned error to any of the trial court's findings of fact. The trial court's conclusions of law are reviewed de novo. *See State v. Holm*, 91 Wn.App 429, 435, 957 P.2d 1278 (1998). This Court does not review the trial court's credibility determinations. *In re Pers. Rest. of Gentry*, 137 Wn.2d 378, 410-11, 972 P.2d 1250 (1999).

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions

based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v.*

McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable

probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the "distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." *Id.* at 689. The reviewing courts should be highly deferential to trial counsel's decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91.

Setzer relies upon *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1997) to support his argument that the juror's comments during voir dire tainted the entire panel and therefore his attorney should have moved to have the entire panel disqualified. However, *Mach* is distinguishable from the facts of Setzer's case. *Mach* involved repeated, expert-like statements directly

concerning guilt. This case involved an isolated person, not as Setzer claims giving her opinion on a witness's veracity, but instead indicating she was biased about a potential witness in a negative way. The trial court found the "statements of the juror in the presence of other jurors were very limited." CP 366. This finding is uncontested on appeal.

Setzer's case is more factually similar to *State v. Alires*, 92 Wn. App. 931, 966 P.2d 935 (1998). In *Alires*, Division 3 of this Court recognized it was a legitimate trial strategy for a trial attorney to not pursue disqualification of jurors that he felt the trial court would not disqualify. *Alires*, 92 Wn. App. at 939. In *Alires*, some jurors made statements which could have been interpreted as evidence of bias and the trial attorney chose not to challenge these jurors because he did not want to antagonize any jurors by unsuccessfully challenging them. *Id.* The Court found that as the defendant's trial counsel's choice was a legitimate trial strategy it could not serve as a basis for a claim of ineffective assistance of counsel. *Id.*

Setzer's case is strikingly similar to the situation in *Alires*. Though Setzer's attorney did move to strike a juror he felt was biased, he made a tactical decision not to risk antagonizing the remaining jurors and did not pursue a motion to strike the entire panel for that reason, and because he felt it would not have been a successful motion. 12/06/12 RP at 77 This

was a legitimate trial strategy and therefore cannot serve as a basis for Setzer's claim of ineffective assistance of counsel. A strategic or tactical decision is not a basis for finding error in trial counsel's performance. *Strickland*, 466 U.S. at 689-91.

Even if this Court finds trial counsel's choice was not a legitimate trial strategy, Setzer cannot show prejudice. As the trial court found in deciding his personal restraint petition, it is unlikely the trial court would have granted this motion. CP 366. Setzer's extremely experienced trial counsel also believed the trial court would not have granted the motion. CP 366; 12/06/12 RP at 77 Setzer has not shown, and cannot show that this juror's statement caused jury bias or prejudice, or that his attorney would have been successful in moving to disqualify the entire panel. Setzer cannot meet the requirements of a claim for ineffective assistance of counsel.

D. CONCLUSION

Setzer had the benefit of extremely experienced and effective counsel, who made many proper strategic and tactical decisions throughout trial. His legitimate trial tactics should not be disturbed. Counsel's choice not to move to disqualify the entire jury panel was a

strategic and tactical decision he made with the best interest of his client in mind. Setzer received effective assistance of counsel and his appeal should be denied.

DATED this 8th day of January, 2013.

Respectfully submitted:

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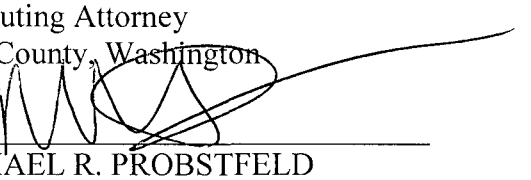
By: 

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER EUGENE SETZER, Appellant.	No. 44558-1-II Clark Co. No. 07-1-00433-5 DECLARATION OF TRANSMISSION BY MAILING

STATE OF WASHINGTON)
: ss
COUNTY OF CLARK)

On January 8, 2014, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO:		
	David Ponzoha, Clerk Court Of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	Jodi R Backlund Attorney at Law Backlund & Mistry PO Box 6490 Olympia WA 98507-6490

DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Date: January 8, 2014.
Place: Vancouver, Washington.